Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

DAWN AKERS, KIM LORANGER, AND UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 6000,
Petitioners,

v.

KENNETH L. MCGINNIS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

May the Michigan Department of Corrections by broad rule ban or regulate all off-duty contact between all Department employees and (1) any of the Department's prisoners, parolees, or probationers and (2) any family member or listed visitor of any of the Department's prisoners, parolees, or probationers?

Does the "public concern" threshold established in *Connick v. Myers*, 461 U.S. 138 (1983), apply to public employees' free association claims as well as their free speech claims?

What are the proper standards for determining whether a broad rule banning or regulating the off-duty associations of public employees violates their rights to expressive, intimate, and other forms of association?

PARTIES

Petitioners are Dawn Akers, Kim Loranger, and Local 6000 of the United Automobile, Aerospace, and Agricultural Implement Workers of America. They were plaintiffs in the District Court and appellants in the Court of Appeals. Akua Mitchell-Davis was an additional plaintiff in the District Court. When the appeal was taken, her claims were moot, although her name continued to be listed in the case caption. She is not a petitioner in this Court.

Respondents are Kenneth McGinnis, Robert Steinman, Marsha Foresman, Patricia Caruso, John Marshall, Edward Haggerty, George Marra, William Overton, Ruth Bare, Frank Eisenhauer, Joseph Jereckos, John Makowski, Terry Pitcher, Kirk McVittie, and Gwen Rodgers. Respondents are or were management officials of the Michigan Department of Corrections. They were defendants in the District Court and appellees in the Court of Appeals.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The District Court's Opinion and Order adopting the Magistrate Judge's Report and Recommendation on defendants' motion to dismiss, thus granting the motion as to claims for monetary damages, is unreported. App. 97a, 109a, 114a. The District Court's Order adopting the Magistrate Judge's Report and Recommendation on plaintiffs' motion

for a preliminary injunction, thus granting the motion, is unreported. App. 75a, 96a. The Magistrate Judge's Report and Recommendation on the parties' cross-motions for summary judgment is unreported. App. 58a. The District Court's Opinion and Order declining to adopt the Report and Recommendation and granting summary judgment to the defendants is unreported. App. 48a, 56a, 57a. The decision of the Sixth Circuit Court of Appeals is reported at 352 F.3d 1030 (CA6 2003). App. 1a. The Sixth Circuit's Order denying rehearing en banc is unreported. App. 47a.

JURISDICTION

The judgment of the Court of Appeals was entered on December 1, 2003. App. 45a. On February 19, 2004, the Court of Appeals denied a timely petition for rehearing en banc. App. 47a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND WORK RULE INVOLVED

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law."

The four relevant iterations of the Michigan Department of Corrections work rule in question are reproduced in the appendix. App. 115a, 118a, 121a, 123a.

STATEMENT OF THE CASE

This case presents important questions about the right to free association of public employees. One of the questions is the subject of a well-developed, explicit split in the Court of Appeals. Another is not so much the subject of a split as of widespread confusion in which there are multiple standards applied by the different circuits.

The explicit split involves standards governing the regulation of expressive association by public employees and raises the question whether such association must touch on a matter of public concern as required by *Connick v. Myers*, 461 U.S. 138 (1983), in order to merit protection under the balancing test set forth in *Pickering v. Bd. of Educ. of Township High Sch. Dist. 205*, 391 U.S. 563 (1968). The Second, Sixth, and Seventh Circuits have held that the *Connick* threshold does apply to association, with the Seventh Circuit indicating it may revisit this position due to misgivings about its correctness. The Fifth and Eleventh Circuits have held that the *Connick* threshold does not apply to association. The Tenth Circuit has held that it should be employed in cases involving overlapping speech and association claims and, noting the split, has declined to rule on whether it should apply to pure association claims. The Eighth Circuit has developed an independent approach that does not include the threshold. The First and Third Circuits have noted the conflict but found it unnecessary to reach the question.

The second major question involves standards governing the regulation of intimate association by public employees. Here the Courts of Appeals have reached different conclusions on virtually every element of the analysis, starting with the source of the relevant doctrine.

In addition, the case poses questions about the use of broad, prophylactic rules to regulate associational conduct.

A. The Work Rule

The work rule in question in this litigation bans all off-duty contact between employees of the Michigan Department of Corrections ("MDOC") and three groups: (1) Michigan probationers, parolees, and prisoners (collectively "offenders"); (2) family members of offenders; and (3) those who are on the visitor's lists for Michigan prisoners. App. 115a-124a.

The ban applies to employees working in any capacity. It applies to any offender, regardless of the nature of his or her offense, as well as to any family member of an offender, regardless of his or her prior or current relationship to the employee or to the offender. It does not matter whether the employee has any responsibility for the offender—or even whether the employee works in a facility or office that has any responsibility for the offender. It is the broadest restriction of the associational rights of public employees on record in the federal courts. By conservative estimate, it bans all contact between the 2000 UAW-represented employees and some 500,000 persons who are under the supervision of MDOC or who are family members or visitors of someone under the supervision of MDOC. [1]

MDOC justifies the rule with reference to concerns about security and abuse. But fully half of the offenders with whom employees may have no contact are on probation—and the overwhelming majority of persons with whom contact is banned have committed no offense other than being related to someone who has become involved in the criminal justice system. Moreover, it is undisputed that MDOC did not trans-

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[1] In 1999, there were approximately 120,000 offenders in Michigan: 65,000 probationers, 13,000 parolees, and 45,000 prisoners. Offenders thus constituted approximately one percent of the state's population. The combined total of parents, siblings, spouses and children of those persons is unknown—but certainly numbers in the hundreds of thousands. *See* Court of Appeals Joint Appendix ("JA") 437-438.

form the rule into a zero-tolerance ban because of any widespread problems of employee misconduct arising out of contact with offenders, their family members, and their visitors; in fact, there is no evidence that such misconduct ever amounted to more than isolated incidents. Rather, as the Magistrate Judge found in a Report and Recommendation whose factual determinations were later adopted by the District Court, MDOC turned the rule into a broad and absolute ban because of negative arbitration and court decisions:

> The testimony of [MDOC's Deputy Director] and [MDOC's Special Assistant to the Director] establishes that this zero tolerance policy was developed as a result of the MDOC losing several arbitration awards and receiving unfavorable rulings in the case of *United States v. Michigan*, 680 F.Supp 270 ([WDMI] 1988). . . . At least one of the reasons for the unfavorable results received by MDOC at these arbitrations was the perceived inconsistency of the discipline meted out by the MDOC for violations of [the rule]. Obviously unhappy with these losses in arbitration, the MDOC threw caution to the wind and adopted the zero tolerance policy which requires the discharge of an employee who has non-professional contact with a family member of a prisoner, parolee or probationer, regardless of whether that contact presents any legitimate concerns for the MDOC.

App. 81a-82a. While MDOC's articulated concerns about security and conflicts of interest are legitimate, their link to the work rule is attenuated, abstract and hypothetical.[2]

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[2] For example, when asked about problems of favoritism in MDOC that were linked to off-duty contact, MDOC's Deputy Director was unable to identify a single instance of such misconduct. JA 432. Similarly, while defendants' affidavits referred to the possibility of employees becoming involved in prison escape plots, there is no evidence of any employee ever having been involved in such a plot. JA 223.

Over the course of this litigation, MDOC has changed the number of the rule in question from Rule 12 to Rule 24 to Rule 46. The earlier and harsher version of the rule is a zero-tolerance policy under which discharge is mandated for all violations, without regard to the particular nature of the employee's associational interests or to the state's interests as employer. In April 2000, following the grant of a preliminary injunction to the plaintiffs, the rule was modified in three ways: to define "family members" for the first time; to contemplate discipline less than termination for violations of the rule; and to initiate an exception procedure allowing employees to apply for permission to have contact with offenders' family members and visitors.[3]

The exception procedure grafted onto the rule was purely discretionary, incorporating no standards governing how a request would be evaluated. As of the close of the record, almost all requests had been granted.

The Sixth Circuit majority focused most of its analysis on the earlier, no-exceptions, mandatory-discharge version of the rule. The majority upheld that version and then found that because the later version was less restrictive of employees'

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[3] Here is an expanded statement of the rule's history during the litigation: Plaintiff Kim Loranger was fired in April 1996, when the Rule was called Rule 12. App. 123a. Prior to Loranger's termination, MDOC had made a decision to enforce Rule 12 with mandatory discharge. That policy was not expressed in the text of the rule. Two months after Loranger was fired, the rule was repromulgated as Rule 24; the rule's language now reflected MDOC's zero-tolerance, mandatory-discharge policy, but was otherwise materially the same. App. 121a. Plaintiff Dawn Akers was fired shortly after the adoption of Rule 24. In September 1999, the rule was repromulgated as Rule 46 without significant substantive alteration. App. 118a. In April 2000, following the grant of a preliminary injunction to the plaintiffs, Rule 46 was amended in the manner described above in the text. App. 115a. After the record closed, in November 2003, the exception procedure was extended to contact with offenders themselves as well as their visitors and family members.

associative rights than the earlier one, it was necessarily valid as well.

Because this rule is so broad, it suspends normal associational life. The conduct it interrupts ranges from the most casual to the most concerted association and spans the spectrum of ways in which people relate to one another, including political and religious association, intimate and close personal association, commercial and professional association, and hybrids of these modes and others. The overwhelming majority of this associational conduct has no relationship to MDOC's interests.

B. The Parties and the Trial Court Record

Petitioners are Local 6000 of the United Automobile, Aerospace, and Agricultural Implement Workers of America ("the UAW" or "Local 6000") and two UAW members terminated under the work rule, Dawn Akers and Kim Loranger.

Respondents are or were the Director of the MDOC and other MDOC management officials sued in their official and individual capacities for promulgating and enforcing the work rule.

The UAW represents 20,000 professional and paraprofessional State of Michigan employees in human services and administrative support units. Some 2,000 are MDOC employees: teachers, social workers, medical and psychological service providers, probation and parole officers, and clerical workers. The UAW does not represent correctional officers or prison guards. JA 282.

1. Akers and Loranger

Akers, a clerical employee in the bookkeeping office of a prison, was terminated for giving a parolee a ride to a job interview. Loranger, a probation officer in Detroit, was terminated for innocuously responding to several letters from a prisoner in Michigan's Upper Peninsula. Both Akers and

Loranger had excellent work records and MDOC never alleged that either employee's conduct was improper in any way except in that it technically violated the work rule.[4] Arbitrators subsequently set aside both terminations and imposed instead suspensions. JA 172, 288-292.

Later, Loranger sought MDOC's permission to attend Mass with her oldest friend, whose adult son had been placed on probation elsewhere in Michigan years after Loranger's friendship with his mother had begun. Loranger wanted her friend to attend her own son's baptism and to be his godmother. MDOC denied Loranger's request, since contact with a probationer's mother would violate the rule. Loranger was thus compelled to obtain a preliminary injunction in order to attend the baptism of her son with a longtime friend whom she wanted to be her only child's godmother. JA 171-174; App. 75a.

2. Additional Record Examples Of Associational Conduct Interrupted By The Rule

The rule sweeps within its proscription association for the purpose of pursuing political and civic purposes. For example, during most of the relevant time period the president of Local 6000 was Lynda Lewis. JA 282. Lewis was also often an official of the Democratic Party and a participant in labor, charitable, and community organizations. JA 283. In early 2000, her nephew was sentenced to a prison term. *Ibid.* Her nephew requested that Lewis, who was herself not covered by

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[4] Both employees had been consistently commended by MDOC management. Akers's overall job performance was repeatedly described as "exemplary" and her friendly professionalism in relating to prisoners who worked as clerks in her accounting office was singled out for praise. JA 289. Loranger's supervisor called her "my top agent and of the highest caliber" an ex-supervisor said she possessed "professional and personal integrity . . . beyond question" and was "morally incapable of knowingly violating a departmental rule." JA 197, 203.

the MDOC's rule, be put on his list of approved visitors. JA 282-283.

Lewis thus became a person with whom 2000 MDOC employees could have no off-duty contact. The earlier version of the rule—to which MDOC is free to revert under the Sixth Circuit's ruling—would have forbidden employees, on pain of mandatory discharge, from sitting down with Lewis to engage in political discussion, to plan charitable fund-raising, or for any other purpose. They would have been barred from attending meetings of all kinds—or, for that matter, union picnics, weddings, or musical concerts—if Local 6000's president was also going to be there. Under the new version of the Rule, hundreds of employees would have to advise the employer of their intended association by filling out exception forms in order to attend these same events.

Beyond political, civic, and religious association—and beyond family choices and friendships ranging from casual to intimate—the rule interferes with the entire spectrum of associational conduct that defines daily life. The record included many further undisputed instances of interactions and activities barred by the rule, including these:

- The rule prohibited plaintiff Loranger from having any contact with a young woman whom she had mentored for sixteen years through a Big Sister-Little Sister program because the woman had been placed on probation under the supervision of an office other than Loranger's. JA 375-376.
- The rule barred one UAW official from have any contact with the majority of his neighbors, including saying hello to them, because someone in almost every family was on probation or otherwise under the supervision of the MDOC. JA 410-411.
- The rule barred employees from attending Alcoholics Anonymous meetings if any other attendees were offenders, their relatives, or their visitors. JA 416.

> Similarly, it barred them from having contact with their doctors, drycleaners, lawyers, fellow Parent-Teacher Association members, and bowling-league competitors when those individuals were offenders (whatever their crime) or when those individuals were visitors or family members of offenders. JA 441-442.

At the preliminary injunction hearing, the Magistrate Judge observed that his brother-in-law was an offender and asked whether MDOC officials would be allowed to attend a cocktail party at which the Magistrate was a guest. Because the rule did not then include any definition of "family member," MDOC's Deputy Director was unsure whether a brother-in-law would fall within the prohibited class. If so, he testified, the MDOC officials would indeed be barred from attending the party. JA 435-437. [5]

Since the facts were undisputed, after the preliminary injunction proceedings, both sides moved for summary judgment. The Magistrate Judge recommended a finding that the old rule was unconstitutional and that issues surrounding the constitutionality of the new rule were not ripe for review. The District Court declined to adopt this recommendation and upheld both versions of the rule.[6]

C. The Sixth Circuit Majority and Dissent

The Sixth Circuit affirmed the District Court's ruling in a split decision, rejecting the arguments of the petitioners and

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[5] Under the revised rule, MDOC officials could attend parties with the Magistrate freely, since brothers-in-law are not covered. If, however, it had been the Magistrate's brother, MDOC officials would have to apply for an exception to attend a party with the Magistrate.

[6] The District Court had, as noted, earlier granted the plaintiffs a preliminary injunction. The conflict between the two rulings appears to result from the fact that the defendants did not file objections to the Magistrate Judge's Report and Recommendation urging that the injunction be granted, but chose instead to modify the rule.

of amicus curiae American Civil Liberties Fund of Michigan. Chief Judge Boggs wrote for the panel majority.

The majority first held that the petitioners' challenge to the original rule was not moot, on grounds that (1) "a defendant's voluntary cessation of unlawful conduct ordinarily does not suffice to moot a case," and that (2) Akers and Loranger had been disciplined under the original zero-tolerance rule. The court's opinion thus began with, and focused on, the challenge to the original rule. App. 5a (citations omitted).

Following *Roberts v. United States Jaycees,* 468 U.S. 609 (1984), the panel majority divided the petitioners' claims into two categories: those addressing the right of expressive association—that is, associational conduct that facilitates other activities protected by the First Amendment–and those addressing the right of intimate association. It located the former in the First Amendment and the latter in the Fourteenth Amendment's due process clause. App. 5a-6a.

The majority held that "state employees' freedom of expressive association claims are analyzed under the same standard as state employees' freedom of speech claims." App. 6a (citation omitted). In turn, it found that standard to be defined by two of this Court's decisions: *Pickering, supra,* which mandates a balancing test between the interests of the employee as a citizen and the interests of the state as an employer, and *Connick, supra*, which establishes a "public concern" threshold that must be reached if an employee's interests are to receive the benefit of *Pickering* balancing. The Sixth Circuit likened *Pickering* balancing to intermediate scrutiny and held that a regulation of speech (or here, association) not touching on a matter of public concern under *Connick* is subject instead to rational basis review. App. 7a-9a.

The panel majority then found that none of the associational conduct barred by the work rule touched on a matter of

public concern. The majority acknowledged that private conduct may touch on a matter of public concern. App. 10a–11a. It did not address MDOC's refusal to allow Loranger to attend church with her friend or most of the other record examples of associational conduct interrupted by the rule, such as participation in Parent-Teacher Association meetings and other community events. The court found that the plaintiffs "c[a]me closest" to meeting the public concern threshold when asserting the right of MDOC employees to have off-duty contact of various kinds with Lewis, the Local 6000 president who was also a party official and a civic leader. However, the panel majority found that such contact could otherwise be regulated under statutes such as the Hatch Act, even though those statutes do not bar public employees from having contact with officials of political parties. App. 10a-11a.

Having thus determined that the work rule was subject to rational basis review, and addressing only in passing the argument that MDOC had failed to demonstrate any nexus between its interests and the preponderance of the associational conduct swept within the rule, the majority found that the rule did not violate the petitioners' First Amendment rights. App. 12a-13a.

The opinion next addressed the petitioners' claim that the rule violated their right of intimate association. The majority held that rational basis review generally applied to this species of constitutional inquiry as well, except in cases of "direct and substantial interference with intimate association." App. 13a-14a (internal citations omitted). Citing earlier Sixth Circuit cases about anti-nepotism rules, the majority found that "we have abstracted a general rule that we will find direct and substantial burdens only where a large portion of those affected by the rule are absolutely or largely prevented from marrying, or where those affected by the rule are absolutely or largely prevented from marrying a large

portion of the otherwise eligible population of spouses." App 14a-15a (internal citation omitted). Because the petitioners had not alleged such a dramatic infringement of the right to marry, the court again found that rational basis review applied. Since it had already found the rule survived such scrutiny, it held that the rule did not unlawfully violate the petitioners' right of intimate association. App. 15a-16a. The court did not address plaintiff Loranger's right to choose her child's godmother. Nor did it address the petitioners' contentions about the broad range of personal relations with no adverse impact on MDOC's interests that are fractured by the rule.

The majority then turned briefly to the revised rule with its exception procedure. Since the petitioners agreed that the new rule was more lenient than the original one, the court held that the new rule was itself necessarily permissible. In any event, the court noted, because the exception procedure would be evaluated under a rational basis standard, it would pass muster regardless of its lack of standards. App. 17a-18a.

Judge Clay concurred in part and dissented in part. He analyzed the work rule under the Eighth Amendment standards established for prison regulations in *Turner v. Safley,* 482 U.S. 78 (1987), and found that the original rule was in several respects not sufficiently related to legitimate penological interests to pass constitutional muster. App 27a-30a. In particular, Judge Clay found that "[t]o require MDOC employees to extricate themselves from community events and organizations in which offenders also happen to participate represents a significant intrusion on the employees' personal liberty." App 33a-34a. Judge Clay also noted that MDOC had not cited any examples at all of improper favors being done for offenders' family members and visitors: "Thus, the MDOC has not based its prohibition against relationships with family members or visitors on particular cause but on questionable speculation that such contacts con-

ceivably could threaten prison security." App. 37a (internal citation omitted).

Judge Clay also found that the fully discretionary exception procedure grafted onto the revised rule failed to render the rule constitutional. App. 37a-39a.

He found that the rule should be modified to eliminate any prohibition on incidental or unknowing contact with offenders, their visitors, and their family members and that the exception procedure should incorporate standards to guide management decisions regarding concerted contact with family members and visitors of offenders. Judge Clay opined that "[w]ithout these common-sense modifications, [the work rule] is an exaggerated—indeed, ridiculous–response to the MDOC's legitimate concern over maintenance of prison security." App. 41a-42a.

REASONS FOR GRANTING THE WRIT

I. THE QUESTIONS PRESENTED ARE URGENT.

This case provides the Court with an urgent opportunity to address the free association rights of public employees. Since 1968, when the Court decided *Pickering, supra,* and thereby established the basic balancing test governing the free speech rights of public employees, it has repeatedly revisited the contours of those rights to refine them. *See, e.g., Connick, supra; United States v National Treasury Employees Union,* 513 U.S. 454 (1995). In contrast, in the same time period, the Court has never addressed associational rights in the public sector. Indeed, the last time it did so was the year before *Pickering* was decided, in *Keyishian v. Bd. Of Regents of the University of the State of N.Y.*, 385 U.S. 589 (1967), when it addressed the important but narrow set of issues surrounding public employees' membership in political organizations thought to be subversive. The Court has never addressed broader infringements of public employees' expressive and/or political associational rights, and has never in any circum-

stance addressed infringements of public employees' right to intimate association. In consequence, the law in this area is in disarray. As to expressive association, the lower courts agree that the Court's speech precedents have some application but differ sharply over the extent to which the analogy holds. In particular, the Courts of Appeals have split over whether to apply *Connick*'s "public concern" threshold to free association claims. *See infra*, at 16-20. As to intimate association, there is even less consistency: some courts locate the right in the First Amendment and some locate it in the Fourteenth Amendment's due process clause. In practical terms, the level of protection for intimate association varies greatly between circuits. *See infra*, at 20-23.

This disarray matters. It causes uncertainty and it tends to lead to the undervaluation of free association rights, as in this case. Both of these consequences affect an enormous number of people since public employees now constitute almost one fifth of the civilian workforce in the United States.

Further, the employment practices of public employers influence general social norms. Because there is no impermeable barrier between government as employer and government as sovereign, public employment practices that undervalue free association rights will tend to undermine those rights in civil society more generally, albeit in a diffuse manner.

This case provides a clean and broad slate. The facts are undisputed. Every variety of associational conduct is affected by the rule being challenged: personal friendships and family decisions; core political and religious association; participation in a wide range of community groups such as charities, Parent-Teacher Associations, and Alcoholics Anonymous; receipt of professional services from lawyers and doctors; and casual interactions in one's neighborhood or at social events. In addition, the case presents questions about the legitimacy of broad prophylactic rules in this context, and about the

minimum showing of nexus an employer must make in order to justify such a rule. *Cf. NTEU, supra.*

The division and confusion in the courts on the important questions presented here reveal the need for a transparent and unified approach to the associational rights of public employees. Absent guidance from the Court, such an approach—one that is consistently capable of doing justice to the interests on both sides—appears virtually certain not to develop.

II. THE COURTS OF APPEALS HAVE SPLIT OVER THE APPLICATION OF *CONNICK*'S "PUBLIC CONCERN" THRESHOLD TO PUBLIC EMPLOYEES' EXPRESSIVE ASSOCIATION CLAIMS.

In *Roberts, supra,* this Court recognized two distinct types of association entitled to heightened protection under the Constitution: "certain intimate associations" that must be secured "against undue intrusion by the State because of the role of such relationships in safeguarding . . . individual freedom," and "the right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion." 468 U.S. at 617.

In the public employment context, expressive association has been analogized to free speech by the Courts of Appeals, and with one exception each one that has squarely considered the issue has adopted the balancing test established by this Court in *Pickering* to analyze free association claims.[7] The

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[7] The Eighth Circuit has not adopted *Pickering* for free association claims but has cited it as supporting by analogy its own approach, described variously as "an intermediate level of scrutiny" and "a case-by-case reasonableness analysis." The Eighth Circuit approach includes no "public concern" threshold either in name or in substance. *International Association of Firefighters, Local No. 380, et al. v. City of Kansas City, et al.* 220 F.3d 969, 973 (8th Cir. 2000).

Pickering Court repudiated the notion that public employees "may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the [public institution] in which they work." *Pickering supra*, 391 U.S. at 568. The public employer did, however, possess "interests in regulating the speech of its employees that differ significantly from those it possesses in connection with regulating the speech of the citizenry in general." *Ibid.* The Court concluded that "[t]he problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Ibid.*

The circuit court split presented by the instant case involves *Connick*, in which the Court elaborated upon the references in *Pickering* to "matters of public concern." *Connick* prescribed a detailed inquiry into the "content, form, and context of a given statement, as revealed by the whole record" to determine whether a public employee's speech had touched on a matter of public concern. *Connick, supra*, 461 U.S. at 148. If it was found not to, the employee's speech would not be balanced against the employer's interests under *Pickering*: "[W]hen an employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest . . . a federal court is not the appropriate forum in which to review" the employee's case. *Id.* at 147. In effect, *Connick* established a threshold test: first a court should determine whether the employee's expression involved a matter of public concern, and only if so should the employee's interests be balanced against those of the employer.

The Courts of Appeals have been sharply at odds for some time over the importation of the *Connick* threshold into the

free association context. The Sixth Circuit has long applied the threshold, as it did in this case. *See Boals v. Gray,* 775 F. 2d 686 (6th Cir. 1985). Very recently, the Second Circuit, after issuing opinions in which it noted the split and described the use of the threshold in association cases as "awkward" and the question as "anything but clear" and "shrouded in uncertainty,"[8] joined the Sixth Circuit on this issue in *Cobb v. Pozzi*, 363 F.3d 89, 102 (2nd Cir. 2004). The Seventh Circuit has applied the *Connick* threshold since 1991. *Griffin v. Thomas*, 929 F. 2d 1210, 1212-1214 (7th Cir. 1991). In its latest cases on this question, however, it has expressed doubts about the correctness of its prior use of the *Connick* threshold and has indicated it may revisit the issue:

> [B]ecause *Connick*'s public concern test grew out of a speech case, it may not appropriately recognize the important distinction between speech and association. This may lead, it can be persuasively argued, to insufficient protection of the associational rights of public employees. Should our approach then to this issue be reexamined? Perhaps. But we think we should wait for a better case than this one to consider a different course.

Balton v. City of Milwaukee, 133 F. 3d 1036, 1040 (7th Cir. 1998).

On the other side of the split, the Fifth and Eleventh Circuits have both unequivocally rejected the *Connick* threshold for free association claims. *Boddie v. City of Columbus*, 989 F. 2d 745, 747 (5th Cir. 1993); *Hatcher v. Board of Pub. Educ. and Orphanage*, 809 F. 2d 1546, 1558 (11th Cir. 1987). The First and Third Circuits have, like the other Courts of Appeals, noted the split, but have found it unnecessary to

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[8] *Melzer v Board of Educ. of the City School Dist. of the City of New York*, 336 F. 3d 185, 196-197 (2d Cir. 2003), cert den. ___ U.S. ___, 124 S. Ct. 1424 (Feb. 23, 2004); *Clue v Johnson*, 179 F. 3d 57, 60 n. 2 (2nd Cir. 1999).

reach the issue in the cases before them. *Tang v. State of R.I., Dept. of Elderly Affairs*, 163 F. 3d 7, 11 n. 4 (1st Cir. 1998); *Sanguigni v. Pittsburgh Bd. of Public Educ.*, 968 F.2d 393, 400 (3rd Cir. 1992).

Finally, the Tenth Circuit has applied the *Connick* threshold to a narrow set of hybrid cases in which an employee's speech and association claims are essentially coextensive. It has declined to extend the threshold beyond hybrid claims. *Schalk v. Gallemore*, 906 F.2d 491 (10th Cir. 1990).

There are several problems with using the *Connick* threshold in association cases. In brief, it raises the bar too high for First Amendment conduct that has no nexus to the public employer's interests and it does not bridge real-life differences between speech and association.

In all but one of this Court's cases on free speech rights in public employment, the speech act in question addressed the subject of the public employer or else took place in the public workplace. *Pickering, supra; Connick, supra; cf. NTEU, supra.* The nexus between the employer's interests and the First Amendment activity was thus built into the factual situation, as is true for other First Amendment issues in public employment. In anti-nepotism cases the nexus is built into the situation because both of the pertinent employees work in the same enterprise. In anti-patronage cases the nexus requirement is built into the pertinent tests. Here, in contrast, much, if not all, of the conduct in question has no nexus to the employment relationship or the employer's interests—in part because it occurs off-duty and in part because associating with others in various ways is an ongoing, constant part of life, in a way that potentially disruptive comments about a public employer are not.

Furthermore, while in speech cases it is sometimes contentious whether a particular statement involves a matter of public concern, there is at least a discrete statement to be

analyzed. Organizations, however, ". . . deliver many different statements at many different times and places . . ." and it is at the very least "shrouded in uncertainty" which statements are the ones that should be analyzed to determine if the association touches upon a matter of public concern. *Melzer*, 336 F.3d at 196. Because individuals join organizations or associate with other individuals for multiple reasons that shift over time, determining whether a particular association by a particular employee touches on a matter of public concern is often impossible.

The outcome in this case evidences the arbitrary underprotection of associational rights occasioned by adoption of the *Connick* threshold. Even conduct at the core of the First Amendment, such as employees' political discussions with Lewis or Loranger's religious association with her best friend, was not enough to earn the petitioners the weighing of their interests against those of the employer. Had that weighing occurred, there can be little doubt as to the outcome, since it is difficult to identify rights more substantial—or even a scrap of legitimate employer interest on the other side.

As shown by the split in the Courts of Appeal—and the result in this case—there is an urgent need for this Court to clarify the standards at issue.

III. THE COURTS OF APPEALS HAVE SCATTERED OVER THE ANALYSIS OF PUBLIC EMPLOYEES' INTIMATE ASSOCIATION CLAIMS.

In the area of expressive association claims by public employees, the axis of disagreement is clear. Intimate association claims by public employees, on the other hand, have met with implicit and explicit disagreements of several kinds. It is not clear what doctrine animates the analysis; neither is it clear which relationships are protected; nor is it clear what

degree of protection obtains in regard to any given type of relationship; nor is it clear what method or test should guide decisionmaking; nor finally are there stable correlations among these areas of uncertainty. In short, the lower courts have not so much split on questions of intimate associational rights in public employment as they have scattered, among the circuits and to some extent within them as well.

Some courts have located the right of intimate association within the Fourteenth Amendment, and some within the First Amendment. *See, e.g., Swank v. Smart*, 898 F.2d 1247 (7th Cir. 1990) (Fourteenth Amendment); *Adler v. Pataki*, 185 F.3d 35 (2nd Cir. 1999) (First Amendment). The Tenth Circuit has required that a public employee allege a specific intent on the employer's part to interfere with the intimate relationship in order to state a claim, bending the analysis sharply in the employer's favor. *Morfin v. Albuquerque Public Schools*, 906 F.2d 1434 (10th Cir. 1990). In addition, the Tenth Circuit evaluates claims on the basis of whether there is "unreasonable governmental interference." *Ibid.* Other courts have adopted a *Pickering* balancing approach. *See, e.g., Shahar v. Bowers,* 114 F.3d 1097 (11th Cir. 1997) (*en banc*), cert. den. 522 U.S. 1049 (1998). The Second Circuit has found it unnecessary to engage in *Pickering* balancing absent some showing of disruption of the employer's operations. *Adler*, *supra,* 185 F.3d at 44-45. The level of uncertainty is partially expressed by the fact that, prior to the Eleventh Circuit's determination that it would apply *Pickering* to intimate association claims, a panel of that circuit discussed the potential application of three utterly distinct tests to a plaintiff's claim that she had been subjected to discrimination because of her marriage—and then declined to select among them, holding that the plaintiff's claim would fail regardless. *McCabe v. Sharrett*, 12 F.3d 1558 (11th Cir. 1994).

On several occasions some time ago, Justices of this Court noted disagreements in the lower courts regarding the level of constitutional protection available for public employees' intimate relationships. *See, e.g., City of North Muskegon v. Briggs,* 473 U.S. 909 (1985) (White, J., dissenting from denial of petition for writ of certiorari)("The difference between the approaches of these two federal courts is evidence of a broader disagreement over whether extra-marital sexual activity, including allegedly unlawful adulterous activity, is constitutionally protected in a way that forbids public employers to discipline employees who engage in such activity."); *Whisenhut v. Spradlin*, 464 US. 965 (1983) (Brennan, J., dissenting from denial of petition for writ of certiorari) ("Although issues concerning the regulation of the private conduct of public employees arise frequently, the lower courts have divided sharply both in their results and in their analytic approach."). If anything, the disarray in this area has increased since Justices White and Brennan, each joined by other members of the Court, urged consideration of these matters.

These questions cry out for clarification. They involve fundamental emotional commitments and experiences that demand consistent treatment by the law, both for dignitary reasons and to enable informed choices.

Further, the treatment accorded petitioners' intimate association claims by the Sixth Circuit majority cannot be right. The court held that unless the government has essentially extinguished the freedom to marry, all of its employees' intimate associations will be accorded identical and minimal protection. The panel majority's approach conflicts with Sixth Circuit precedent adopting an "undue intrusion" test for assessing a public employee's claim of violated rights of intimate association. *Adkins v. Bd. of Ed. Of Magoffin Cty., KY*, 982 F.2d 952, 956 (6th Cir. 1993). It also conflicts with this Court's instruction that the right of intimate association

exists along a continuum and that constitutional protection for personal associations is not limited to family relationships or to marriage. *Roberts*, *supra,* 468 U.S. at 619-620; *Bd. Of Dirs. Of Rotary Int'l v. Rotary Club*, 481 U.S. 536, 545 (1987); *see also Lawrence v. Texas*, 539 U.S. 558 (2003).

Petitioner Kim Loranger was compelled by the respondents to obtain a preliminary injunction in order to exercise the right to choose her child's godmother. Absent the injunction, she was forbidden from having any contact with that godmother, her closest friend—one of the people in relation to whom she had shaped her own life and self. This prohibition operated despite the uncontested absence of any real-world risks to MDOC's interests. Not every relationship will be entitled to as much deference as that one—and no doubt some, though not many, are entitled to more. But the holding below trivializes virtually the entire range of intimate associational conduct. The Court should grant certiorari in order to clarify the confusion that has resulted in such rulings.

IV. THE COURT SHOULD ESTABLISH A STANDARD TO GOVERN RULES THAT PROSCRIBE A BROAD RANGE OF CASUAL AND HYBRID ASSOCIATION BY PUBLIC EMPLOYEES.

As the Court noted in *Roberts,* different modes of association can overlap. *Roberts,* 468 US at 618. Associational life is both hybridized and dynamic. Greeting a neighbor can lead over time to the formation of a community group opposed to installing a race track across the way or to a lifelong romance. Seemingly casual attendance of a Parent-Teacher Association meeting most often expresses a profound commitment to the experience of one's children.

This hybrid, dynamic quality poses a serious challenge—indeed, an insurmountable challenge—to any broad rule like the one here. At a very basic level, current analysis of asso-

ciational claims focuses on how meaningful or important the association is in one way or another. Thus casual or incidental contact is understood to merit less constitutional protection by virtue of its casualness. However, casual association can lead to or coexist with contact that would clearly be regarded as highly protected.

A sweeping rule like this one must be analyzed under a standard that does not cut those connections short; in the end, any such standard will necessarily invalidate the rule. Without any showing of a real risk of harm, MDOC proposes to stifle and truncate the basic human exchanges that create community and society, that make us who we are.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted

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